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IN THE
SUPREME COURT OF THE UNITED STATES

No. October Term, 1986

UNITED STATES OF AMERICA,
Respondent

v.

ALAN J. ROCHMAN,
Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respectfully Submitted,

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QUESTION PRESENTED FOR REVIEW

May the Government ignore extant, available and constitutionally inoffensive means of investigating the suspected illicit billing practices of a physician before they intrude upon the 14th Amendment right to privacy which his patients have in their medical records by utilizing a search warrant to seize those documents from the physician's office?

PARTIES TO THE PROCEEDING

The parties to this case in the proceedings before the United States Court of Appeals For the Third Circuit and the United States District Court For the Middle District of Pennsylvania were the United States of America, whose interests were represented by the United States Attorney for the Middle District of Pennsylvania, and Alan J. Rochman, M.D., Petitioner herein.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
GROUNDS ON WHICH SUPREME COURT JURISDICTION IS INVOKED	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS RELIED UPON FOR ALLOWANCE OF WRIT	4
CONCLUSION	9
APPENDICES:	
FEBRUARY 26, 1986 ORDER OF THE HONORABLE WILLIAM W. CALDWELL, JUDGE, UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DOCKETED TO NO. MISC. 86-041 (In Re: Misc. 86-036) DENYING PETITIONER'S "MOTION TO ENJOIN, OR IN THE ALTERNATIVE, FOR RELIEF FROM EXECUTION OF SEARCH WARRANT."	A-1
JANUARY 28, 1987 OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IN *IN RE: SEARCH WARRANT (SEALED)* DOCKETED TO NO. 86-5150	A-3
FEBRUARY 27, 1987 ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITIONER'S "PETITION FOR REHEARING"	A-13

TABLE OF AUTHORITIES

Cases:	Page
Arp. v. Workers' Comp. Appeals Board, 19 Cal. 3d 395, 138 Cal. Rptr. 293, 563 P.2d 849 (1977)	6
Barry v. City of New York, 712 F.2d 1554 (S.D.N.Y. 1982)	4
City of Carmel-By-The-Sea v. Young, 2 Cal. 3d 259, 85 Cal. Rptr. 1, 466 P.2d 225 (1970)	6
Fireman's Fund Ins. Co. of Washington, D.C. vs. Washington, 483 F.2d 1323 (U.S. App. D.C. 1973)	5
Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965)	4
Hawaii Psychiatric Soc. v. Ariyoshi, 481 F. Supp. 1028 (D.C. Hawaii 1979)	4
Lawton v. Steele, 152 U.S. 133, 14 S. Ct. 499, 38 L.Ed. 385 (1894)	7
Linn v. Superior Court, 166 Cal. 3d 1138, 212 Cal. Rptr. 811 (1985)	7
Roe v. Wade, 410 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976)	4
Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960)	6
Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965	6
Slevin v. City of New York, 551 F. Supp. 917, aff'd in part rev'd in part, *Barry v. City of New York*, 712 F.2d 1554, cert. denied 103 S.Ct. 548 (S.D.N.Y. 1982)	4
U.S. v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)	7
U.S. v. Westinghouse Elec. Corp., 638 F. 2d 570 (3rd Cir. 1980)	5, 8

TABLE OF AUTHORITIES—*(Continued)*

Cases: Page

Westbrook v. Mihaly, 2 Cal. 3d 765, 87 Cal. Rptr. 839, 471 P.2d 484 (1970) 6

Whalen v. Roe, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) 5

CONSTITUTION:

United States Constitution, Article 4, Section 2 ..... 2, 4

United States Constitution, 9th Amendment 2

United States Constitution, 14th Amendment 2, 4, 6

MISCELLANEOUS:

Tribe, "American Constitutional Law," pg. 426, The Foundation Press, 1978 4

Wormuth and Mirkin, "The Doctrine of the Reasonable Alternative". 9 Utah L. Rev. 245 (1964) 6

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IN THE

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No. October Term, 1986

UNITED STATES OF AMERICA,

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v.

ALAN J. ROCHMAN,

Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals For The Third Circuit entered in these proceedings on January 28, 1987 affirming the Order of the United States District Court For The Middle District of Pennsylvania entered in the above matter on February 26, 1986.

OPINIONS BELOW

The Opinion of the Court of Appeals is not yet reported, it is, however, attached hereto at Appendix "B".

The Order of the District Court denying Petitioner's "Motion To Enjoin, Or In The Alternative, For Relief From Execution Of Search Warrant" is similarly unreported; it is, however attached hereto as Appendix "A".

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GROUNDS ON WHICH SUPREME COURT JURISDICTION IS INVOKED

The judgment of the United States Court of Appeals For The Third Circuit was entered on January 28, 1987. A timely Motion For Rehearing was filed with that Court and was denied on February 27, 1987.

Your Honorable Court has jurisdiction pursuant to the provisions of 28 U.S.C.A. §1254 which provides, in pertinent part, that

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> 1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case. . . .

CONSTITUTIONAL PROVISIONS INVOLVED

Article IV

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in several states.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

On February 4, 1986, upon application of the F.B.I., a search warrant was issued authorizing the seizure from the Millerstown, Pennsylvania medical offices of Alan J. Rochman, M.D. and Greenwood Medical Association, P.C., Dr. Rochman's professional corporation, of, *inter alia*, all medical records of 210 named patients, together with appointment books, ledger cards and insurance claim forms for the period January, 1984 to November, 1985. The affidavit of probable cause submitted in support of the issuance of this warrant was sealed by order of the issuing magistrate.

On February 5, 1986 the subject warrant was executed and the aforesaid records seized.

Virtually simultaneously with the seizure of the medical records, a "Motion To Enjoin Or, In The Alternative, For Relief From Execution of Search Warrant" was filed with the United States District Court for the Middle District of Pennsylvania. In this motion, Dr. Rochman asserted his patients' constitutional right to privacy as the basis for his request for the return of the seized records.[1]

On February 26, 1986 the lower court denied the aforesaid Motion and authorized the release of the seized material to the Government. The Court directed the Government ". . . to treat said records and the information contained therein as confidential. No disclosure of said information shall occur except as reasonably required in connection with its investigation and/or

---

1. Because there was no criminal prosecution *in esse*, the pleadings before the trial court were captioned "In re: Search Warrant (Sealed)". Indeed this caption was retained throughout the proceedings before the intermediate appellate court. Following the denial of Dr. Rochman's Petition For Rehearing in the United States Court of Appeals For The Third Circuit, an indictment was returned against Dr. Rochman charging him with committing "Frauds and swindles" and "False, Fictitious or fraudulent claims" in the submission of Medicare and private health insurance claims in violation of 18 U.S.C. §§287 and 1341 respectively. In view of the disclosure attendant to the return of the Indictment, the necessity for sealing no longer exists and the actual caption of the case giving rise to the issue presented herein has been utilized.

presentment to a grand jury."[2] App. A-1, *infra*.

On February 28, 1986 an appeal from the denial of this Motion was filed with the United States Court of Appeals For The Third Circuit.

In a written opinion issued on January 28, 1987 and attached hereto as Exhibit "B", a panel of the Court of Appeals denied Dr. Rochman's appeal.

A timely Petition for Rehearing was filed with the Court of Appeals. This request was denied on February 27, 1987.

Because, *inter alia*, of the illness of counsel for the Petitioner, an extension of time within which to Petition Your Honorable Court for the issuance of a Writ of Certiorari was sought. Petitioner's request was granted and the due date hereof extended for twenty-one (21) days until May 19, 1987.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

Inherent in the concept of personal liberty vouchsafed by the Due Process Clause of the 14th Amendment to the United States Constitution is the right of each citizen to personal privacy.[3] *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L. Ed. 2d 147

2. Because there was no criminal prosecution *in esse*, the existence of a grand jury or other investigation was, apparently, inferred by the lower court from the issuance of the search warrant and from conversations with counsel. Although there is no information of record to corroborate this inference, the existence of an investigation into the propriety of certain professional billing practices is not in dispute. Indeed, subsequent events, including the return of an Indictment, have confirmed the fact of such an investigation. See page 5, *supra*.

3. The Constitutional entitlement to personal privacy may also be assured by the 9th Amendment to the United States Constitution — see *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (Goldberg, J. concurring); *Hawaii Psychiatric Soc. v. Ariyoshi*, 481 F. Supp. 1028 (D.C. Hawaii 1979) — and by the "Privileges and Immunities" provision of Section 2 of Article IV of the United States Constitution. See, e.g., Tribe, "American Constitutional Law." pg. 426, The Foundation Press, 1978. Any right so assured is equivalent with and co-terminous to that afforded by the 14th Amendment, see *Slevin v. City of New York*, 551 F. Supp. 917, aff'd in part, rev'd in part *Barry v. City of New York*, 712 F. 2d 1554, cert. denied 103 S. Ct. 548 (S.D.N.Y 1982).

(1973). While ". . . the full measure of the constitutional protection of the right to privacy has not yet been delineated, we know that it extends to two types of privacy interest: 'One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.' " *U.S. v. Westinghouse Elec. Corp.*, 638 F. 2d 570 (3rd Cir. 1980), citing *Whalen v. Roe*, 429 U.S. 589, 97 S. Ct. 86, 51 L. Ed. 2d 64 (1977).

The constitutional right to privacy, then: 1) protects against both the disclosure of personally sensitive information — the right to confidentiality — and; 2) insures that personal decisions made with respect to those and other sensitive, personal matters will in no way be inhibited by fear of their disclosure — the right to personal autonomy.

The matter *sub judice* implicates both aspects of the right to privacy: 1) the seizure and use of the patients' medical records will effect the disclosure and dissemination of intimately personal matters, and; 2) by virtue of the disclosure of this information, the willingness of the affected patients and others to visit their physician and forthrightly discuss the intimate details of their lives will be impaired.

Individual privacy rights, of course, are not absolute and, in some cases, the Government *may* possess superordinate interests of such significance that they supercede this personal, constitutional right.

The investigation of suspected criminal activity is an interest that may assume such superordinate status. The authority for the government to undertake such investigations — to exercise its police power — is itself, however, circumscribed. Besides the obvious constitutional limitations imposed upon the exercise of the state's police power, the authority granted to the state to investigate crime is not a static, absolutely defined phenomenon; it is, rather, flexible and dynamic and changes and expands as society becomes more complex. *Firemen's Ins. Co. of Washington, D.C. v. Washington*, 483 F.2d 1323, (U.S. App. D.C. 1973). Thus, in any particular case, the propriety of the state's intrusion upon a private constitutional right in the exercise of its police power is subject to scrutiny and must be justified. In no case can

the exercise of police power ". . . be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364, U.S. 479, 81 S.Ct. 247, 5 L. Ed. 2d 231 (1960).

To support the Government's position, in the instant matter, however, is to *ipso facto* elevate the exercise of the Government's interest to a superordinate position *vis a vis* the 14th Amendment right to privacy and to grant absolute authority to circumvent rights specifically protected by the 14th Amendment.

Thus the mere presence of a governmental interest is not adequate to justify the intrusion upon a constitutionally protected right. Indeed, the existence of a government interest

> . . . only determines the nature of the compelling interest. It does not complete the constitutional equation. *An impairment of an interest of constitutional dimension passes constitutional muster only if it is necessary to achieve the compelling interest*. (see *City of Carmel-By-The-Sea v. Young* (1970) 2 Cal. 3d 259, 267, 85 Cal. Rptr. 1, 466 P. 2d 225; *Arp v. Workers; Comp. Appeals Board* (1977). 19 Cal. 3d 395, 406, 138 Cal. Rptr. 293, 563 P. 2d 849; *Westbrook v. Mihaly* (1970) 2 Cal. 3d 765, 784 — 785, 87 Cal. Rptr. 839,471 P. 2d 484; *Sherbert v. Verner* (1963) 374 U.S. 398, 407, 83 S. Ct. 1790, 1795, 10 L. Ed. 2d 965, 972.) That means that the conflict between the competing values must be unavoidable. It can readily be seen that *if the conflict is avoidable but is not avoided the real conflict is not between the compelling interest and the constitutional interest but between the means chosen to achieve the compelling interest and the constitutional interest*. Thus, a logical corollary of the compelling interest doctrine is the alternatives test. It requires a reordering of the values to be placed on the constitutional scales. *If an alternative means of securing the compelling interest can be devised by which to avoid or minimize the conflict between the values protected by the constitution and the values found to be of compelling interest, that must be done*. (See generally, Wormuth and Mirkin, The Doctrine of the Reasonable Alternative (1964) 9 Utah L.

> Rev. 245). This results in a prohibition, among other things, of overbroad means of enforcement. It requires that the state utilize the 'least intrusive' means to satisfy its interest. (Emphasis added.)

Linn v. Superior Court, 19 Cal. 3d 395, 212 Cal. Rptr. 811 (1985).

The state's police power, then, does not inherently possess status equal to a constitutional right. Rather, it can only be elevated to an equivalent position if it is genuinely "compelling."[4] The existence of unexhausted alternatives vitiates any claim that the Government's interest is compelling and deprives it of constitutional equivalency. Indeed,

> To justify the state in . . . interposing its authority in behalf of the public, it must appear — First, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. *Lawton v. Steele*, 152 U.S. 133, 14 S.Ct. 499, 38 L. Ed. 385 (1894).

Because other, less intrusive, constitutionally inoffensive means existed to secure the information necessary to accommodate the Government's needs herein and because the Government failed to pursue these readily available, alternative means, the Government's interest herein cannot fairly be characterized as compelling and, therefore, can in no way be equated with, let alone outweigh, the patients' constitutional right to privacy. The patients in whose records the Government had an interest could have been questioned about their medical treatment, they could have been asked to sign medical releases authorizing the disclosure of their records, or the Government could have obtained

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4. Government interests such as the exercise of its police power, at a minimum can be characterized as, *inter alia*, "compelling;" "substantial;" "subordinating;" "paramount;" "cogent;" "strong." *U.S. v. O'Brien*, 391, U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968).

information regarding tests performed on these patients and the charges made therefor from Pennsylvania Blue Shield, their Medicare carrier.

The failure to pursue these extant, available, constitutionally inoffensive, alternative means to secure the information necessary to further the Government's investigation unnecessarily and artificially created a conflict of constitutional proportions — unnecessarily because other means existed to secure the needed information and artificially because recourse thereto was ignored. Thus, this intrusion and the concomitant constitutional violation which it occasioned need never have occurred and should not have been sanctioned much less resolved in favor of the Government as the lower courts have done.

This is particularly true in view of the significant nature of the constitutional intrusion. At a time when the President of the United States is calling upon citizens to voluntarily cease the use of illicit drugs, Speech reported in the New York Times, September 15, 1985, and when the disease AIDS is assuming cataclysmic proportions, the significance of unimpeded access to a physician and an assurance of confidentiality with respect to communications therewith is greater than ever.

The justification for the seizure by search warrant of patient medical records in the matter *sub judice* may be great, but, in cases such as the one before Your Honorable Court, where alternative, constitutionally inoffense means exist to secure the ostensibly necessary information, a seizure such as occurred herein can hardly be sanctioned. The harm created by such a seizure is, in view of the alternative means available to secure the needed information, grossly disproportionate to the benefit derived therefrom.

It is quite true, as noted by the Court of Appeal's opinion, that, in determining whether or not the privacy right should be subordinated to a governmental interest, *U.S. v. Westinghouse Elec. Corp., supra*, has prescribed a formula for balancing the competing interests. Performance of such a judicial balancing act in the within matter, however, is premature until the Government exhausts extant, practical, constitutionally inoffensive means of securing the information. In this case no such effort was

made. Only when, because all practical, alternative means of recourse have been exhausted and satisfaction of the Government's interest by constitutionally inoffensive means is precluded, is the Government's interest genuinely compelling and entitled to elevation to a level of constitutional equivalency.

Clearly, then, in the instant matter, the Government's failure even to attempt to secure the desired information in a constitutionally inoffensive way eviscerates its claim to constitutional equivalency and, therefore, balancing the Government's interest with the patients' constitutional right, let alone weighing the balance in favor of the Government, as was done below, is entirely inappropriate.

CONCLUSION

For the aforesaid reason, it is respectfully submitted that Your Honorable Court should grant this petition, issue a Writ of Certiorari and reverse the decision below.

Respectfully Submitted,

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APPENDIX

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

In Re:	:	
Search Warrant Executed		No. Misc. 86-041
Upon Alan J. Rockman, M.D.	:	(In Re: Misc. 86-036)

ORDER

AND NOW, this 26th day of Feburary, 1986, after consideration of the arguments and law submitted by Alan J. Rockman, M.D. and the United States Attorney, it is hereby ordered as follows:

1) The motion filed on February 5, 1986 by Alan J. Rockman, M.D., to enjoin or, in the alternative, for relief from, execution of search warrant, is DENIED.

2) The Clerk of Court is directed to deliver the photocopies of medical records, received on February 7, 1986, to the United States Attorney for investigation and possible prosecution.

3) The United States Attorney, the FBI and all persons acting on behalf of the government, are directed to treat said records and the information contained therein as confidential. No disclosure of said information shall occur except as reasonably required in connection with its investigation and/or presentment to a grand jury.

4) This order shall be placed under seal until further order of court.

William W. Caldwell
United States District Judge

Filed
Harrisburg, PA

February 26, 1986

PER. DONALD R. BERRY,
Deputy Clerk

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5150

IN RE: SEARCH WARRANT (SEALED)

On Appeal from the United States
Court of Appeals for the Middle
District of Pennsylvania (Scranton)
Misc. No. 86-041

Submitted Under Third Circuit Rule 12(6)
October 16, 1986

Before: GIBBONS and BECKER, *Circuit Judges*,
and FULLAM, *District Judge**

(Filed January 28, 1987)

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* Honorable John P. Fullam, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

BECKER, *Circuit Judge*.

This is an appeal by a physician being investigated for possible insurance fraud from an order of the district court denying a motion that, if granted, would in effect suppress as evidence certain of his medical records seized pursuant to a search warrant. There has been no indictment and, insofar as the record reveals, no grand jury has initiated an investigation into the alleged wrongdoing. This appeal consequently requires us to consider as threshold matters both the appealability of the district court's order at this early stage of the criminal process and the physician's standing, for he asserts his patients' privacy interests as the basis for suppression.

We find that order is appealable because it is sufficiently independent from the anticipated criminal proceedings against the physician. Additionally, we also find that the physician has standing, for only he is in a position to protect these patients' privacy rights. We therefore reach the merits of the physicians' claim, requiring us to balance the individual privacy interests in the patients' medical records against the legitimate interests of the government in securing the information contained therein. Finding that the district court did not err in performing this delicate balancing,[1] we affirm the district court's order denying the physician's motion.

I.

The physician with whom we are concerned is a subject of a federal criminal investigation concerning the alleged submission of multiple billings to Pennsylvania Blue Shield and Medicare for medical tests that were performed only once and that in some cases may not have been medically necessary. Believing that information relevant to this investigation was contained in

1. Because this balancing involves a question of law, our standard of review is plenary. *See, e.g.*, United States v. Felton, 753 F.2d 276, 278 (3d Cir. 1985).

the medical records of certain of the physician's patients, on February 4, 1986 a Special Agent of the Federal Bureau of Investigation took a search warrant affidavit before a United States Magistrate for the Middle District of Pennsylvania. The Magistrate, finding probable cause, issued a warrant that authorized the FBI to search the offices of the physician and his professional corporation. The warrant also authorized the FBI to seize certain specified property:

1. Appointment books from January 1984 through October 1985.

2. For each of the following 210 named patients:

   A. All medical records.

   B. All account ledger cards from January 1984 through October 1985.

   C. All medical insurance claim forms from January 1984 through October 1985.

   D. All Explanation of Blue Shield Benefits forms.

   E. All Explanation of Medicare Benefits forms.

This property was seized when the warrant was executed on February 5, 1986.

Later in the day that the warrant was executed, the physician filed a "Motion to Enjoin or, in the Alternative, for Relief From, Execution of Search Warrant" in the District Court for the Middle District of Pennsylvania. The physician alleged that the warrant violated the constitutional right to privacy in that it breached his patients' privilege against disclosure of confidential medical records. Within two days after this motion was filed, the government agreed to photocopy the medical records, place the copies under seal with the Clerk of Court, and return the originals.

By order dated February 26, 1986, the district court denied the physician's motion and directed the clerk of court to deliver

the photocopies of the medical records to the United States Attorney for use in investigation and possible prosecution. The order also directed the government to handle the medical records with due regard for the confidential nature of the information they contained:

> The United States Attorney, the FBI and all persons acting on behalf of the government, are directed to treat said records and the information contained therein as confidential. No disclosure of said information shall occur except as reasonably required in connection with its investigation and/or presentment to a grand jury.

To further aid in maintaining confidentiality, the record of the proceedings were placed under seal.

On February 28, the physician requested the district court to stay its order pending appeal. The court refused. The physician now appeals seeking reversal of the district court's February 26 order, which denied an injunction against the government's review of the medical records or their disclosure to any person or investigative body.

II.

Although the physician has not been indicted, the search warrant was sought, issued and executed within the frame of reference of an ongoing criminal investigation of which the physician is the target. Hence, our frame of reference for analysis of appealability and standing is the jurisprudence in criminal cases. We analogize the relief sought to a motion to suppress.[2]

An appeal is not generally available from the denial of a pre-indictment motion to suppress evidence before the conclusion of trial, *see DiBella v. United States*, 369 U.S. 121 (1962), because the denial is "merely a step in the criminal process, and any rights involved are adequately protected in subsequent trial proceedings." *United States v. Premises Known as 608 Taylor Ave.*, 584 F.2d 1297, 1300 (3d Cir. 1978). A significant exception, however, allows for immediate appeal of orders that are sufficiently independent from the anticipated criminal proceeding.

2. *See infra* at 9-10 n.4.

See id. We must therefore decide if the district court's order is of sufficient independence from the anticipated criminal proceeding against the physician to be immediately appealable.

A request for pretrial appellate review of the denial of a motion to suppress evidence usually arises when the movant seeks to assert his own constitutional rights. *See, e.g., G.M. Leasing Corp. v. United States*, 429 U.S. 362 (1977); United States v. Furina, 707 F.2d 82 (3d Cir. 1983); *Hill v. United States*, 346 F.2d 175 (9th Cir.), *cert. denied*, 382 U.S. 956 (1965). In this usual situation, there is sufficient independence "[o]nly if the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant." *DiBella*, 369 U.S. at 11-32. It is not and cannot be disputed that the instant motion seeks the suppression of evidence, not just its return. Indeed, the records in question have been copied and the physician again possesses the originals. If he were asserting a violation of his own rights, his appeal would certainly be foreclosed under *DiBella* as insufficiently independent of the anticipated criminal proceeding against him. *See, e.g., United States v. Furina*, 707 F.2d 82, 84 (3d Cir. 1983).

Here, however, the interests of others besides the physician are implicated by the district court's order. Because of these third-party rights, we hold that the order is of sufficient independence from the anticipated criminal proceedings against the physician to be immediately appealable. For the physician's patients, who do not face potential criminal charges, the scrutiny of their medical records is not "merely a step in the criminal process," *608 Taylor Ave.*, 584 F.2d at 1300. Moreover, any privacy interests the patients may have are immediately threatened by the government having obtained such highly sensitive personal information as may be contained in their medical files, and these interests will not be "adequately protected in subsequent trial proceedings." *Id.* If the patients' right to privacy have been breached, relief must be immediately granted; appellate review should not be postponed — and perhaps entirely foreclosed — by a rule which would make such review available only if and when the physician is indicted, prosecuted, and convicted.

Our holding on this point might well be different if it were to appear that the physician has asserted the privacy interests of his patients as a mere sham to secure immediate appellate review of the district court's order, or if his arguments in support of the rights he asserts were frivolous. No sham is apparent, however, from the record before us. The physician asserted this claim the very day that the warrant was executed and has diligently pressed the matter both before the district court and before us. Although he has an obvious personal interest in suppressing the evidence in question, that fact does not overcome his apparent good faith in pressing the interests of his patients. Moreover, the asserted privacy interest cannot be considered frivolous. As we develop more completely below, see *infra* at 8-9, a privacy right undeniably exists and is applicable to the compelled disclosure of medical records.

Of course, if the physician has no standing to assert the privacy interests of his patients, he could not now appeal the district court's order. We find, however, that this situation is within the plain purview of our decision in *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570 (3d Cir. 1980), and that the physician therefore does have standing to press his patients' claims. As the government itself concedes, the physician "is the proper proponent to assert his claim on behalf of his patients." Government's Brief at 20; *see also Westinghouse*, 638 F.2d at 574 ("As a practical matter, the absence of notice . . . of the subpoena means that no person other than [the movant] would be likely to raise the privacy claim."); *cf. Singleton v. Wulff*, 428 U.S. 106, 118 (1976) (allowing physician to assert privcy rights of his patients); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965) (same).[3]

---

3. Despite this concession, the government argues that "prudential concerns" militate against a finding that the physician has standing to press the instant appeal. Under the jurisprudence on the matter, however, we find this contention specious. Under the circumstances, the physician has displayed a sufficient "stake in the outcome" to assure "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends." *Westinghouse*, 638 F.2d at 574 (quoting Baker v. Carr, 369 U.S. 186, 204

III.

On the merits, the physician contends that his patients have a privacy interest under the United States Constitution in their medical records, and the government does not challenge this claim. It is indeed clear beyond peradventure that "the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." *Thornburgh v. American College of Obstetricians*, 106 S.Ct. 2169, 2184 (1986). This constitutional right to privacy extends to "the individual interest in avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U.S. 589, 599 (1977); *Trade Waste Management Ass'n., Inc. v. Hughey*, 780 F.2d 221, 223 (3d Cir. 1985); *see also* Kurland, *The Private I*, The University of Chicago Magazine 7, 8 (Autumn 1976) ("The concept of a constitutional right of privacy [includes] the right of an individual not to have his private affairs made public by the government."). And as courts have held, medical records are clearly within this constitutionally protected sphere. *See, e.g., Whalen*, 429 U.S. at 876-78; *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980 ("There can be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection."); *Shoemaker v. Handel*, 608 F. Supp. 1151, 1159 (D.N.J. 1985) ("There is a privacy interest in avoiding disclosure to government agents of personal medical information.").

Our recognition that this privacy right exists and is applicable to the compelled disclosure of medical records, however, does not end the inquiry. The protection afforded by the right to privacy is not absolute. The individual privacy interest in the patients' medical records must be balanced against the legitimate interests of the state in securing the information contained

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(1962)). Because the physician has displayed this necessary degree of adverseness to the government's position, no prudential concerns strip him of standing. *See* Separation of Church and State, Inc. v. HEW, 619 F.2d 252 (3d Cir. 1980).

therein. *Cf. Whalen, supra; Westinghouse, supra.*[4]

The task of balancing these interests is not one we face anew. In *Westinghouse*, we enumerated "[t]he factors which should be considered in deciding whether an intrusion into an individual's privacy is justified":

> . . . the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

638 F.2d at 578.

As applied to the facts of this case, the *Westinghouse* factors are easily satisfied. *Cf. United States v. Colletta*, 602 F.Supp. 1322 (1985) (holding that seizure pursuant to search warrant of medical files did not violate patients' privacy rights). As to the first four factors, there is no indication of harm to the patients

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4. *Whalen and Westinghouse*, in common with most cases that balance the privacy interests in medical records with the state interest in information collection, do not concern the procurement of records pursuant to valid search warrant. In *Whalen*, the Supreme Court was faced with a portions of the New York State Coantrolled Substances Act of 1972, which mandated that a copy of prescriptions for certain drugs be filed with the State Department of Health. In *Westinhouse*, we reviewed an administrative subpoena duces tecum that was issued by the National Institute of Occupational Safety and Health pursuant to 29 U.S.C. §§657(b), 669(b), 671(c), and required the production of certain medical records. We do not believe that either of these situations is sufficiently different from the valid search warrant situation that we now face to compel the conclusion that the cases ought be distinguished. *Accord* United States v. Colletta, 602 F. Supp. 1322 (E.D. Pa. 1985). The only possible distinguishing point is that a search warrant necessarily interposes a judicial determination of reasonableness between the government and the individual prior to any disclosure. Within the context of our analysis, however, this is merely a distinction without a difference. If the government can obtain such information without a judicial determination, there is no reason to prevent its acquisition when such guidance is involved.

because of the information contained in their records or the dissemination that is to be expected. The medical records of the physician's patients are of the same type as those that were held subject to subpoena in *Westinghouse*, and the harm in disclosure cannot be considered any greater, hence, in this respect, *Westinghouse* controls.[5] As the Court pointed out in *Whalen*, the identities of the patients involved are already known through insurance submissions, and their privacy interests are thereby diminished. *See* 429 U.S. at 603; *accord In re Zuniga*, 714 F.2d 632, 641-42 (6th Cir.), *cert. denied*, 104 S.Ct. 426 (1983). Additionally, two separate mechanisms exist to guard against unauthorized disclosure. Initially, and prior to any submission to a grand jury, the district court's special directions operate to maintain the confidentiality of these records. Thereafter, as the physician himself concedes, presentation to a grand jury will not lead to untoward dissemination. *See* Appellant's Brief at 17; *see also* Fed. R. Crim. P. 6(e) (protecting confidentiality of grand jury proceedings).

The final two *Westinghouse* factors are also satisfied. There is an express statutory mandate to investigate and determine the sort of fraud under investigation here, *see, e.g.*, 42 U.S.C. § 3525(a)(3) (authorizing administrative subpoena of medical files), a mandate which "ranks with the other public interests

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5. The physician relies heavily on the case of *Hawaii Psychiatric Assoc. v. Ariyoshi*, 481 F. Supp. 1028 (D.Hawaii 1979). Because the instant appeal does not involve psychotherapeutic care, we need not decide whether psychiatric records of the type at issue in *Hawaii Psychiatric* merit a higher degree of privacy sufficient to outweigh legitimate governmental interests in acquiring the information contained therein. *See, e.g., id; cf.* Taylor v. United States, 222 F.2d 398, 401 (1955) (finding heightened privacy interest in psychiatric records under state privilege law); In re "B," 482 Pa. 471, 394 A.2d 419, 425 (1978) (same); *but cf. Developments in the Law — Privileged Communications*, 98 Harv. L. Rev. 1450, 1519 (1985) ("the glib distinctions frequently drawn between the [psychotherapist-patient and physician-patient] relationships oversimplify their actual dynamics"). Nor do we need to decide if the medical records of vicitims of socially stigmatizing diseases, such as AIDS, deserve to be accorded higher privacy interests. *Cf.* Note, *The Constitutional Rights of AIDS Carriers*, 99 Harv. L. Rev. 1274, 1287-89 (1986).

which have been found to justify intrusion into records and information normally considered private." *Westinghouse*, 638 F.2d at 579. Moreover, the prosecution has demonstrated a reasonable need for the entire medical record.[6] Because the physician requested that insurers pay for care rendered or tests performed on certain dates, only the patients' medical records will reveal to the grand jury whether the physician performed the specified services at the specified time and whether the services were medically necessary. Further, only by examining these records can a determination be made whether impropriety was involved if multiple billing is suspected from contemporaneous performance of related tests.

Because significant government interests in investigation clearly outweigh any individual privacy interest, the *Westinghouse* factors have been satisfied. The district court's order dening the physician's motion will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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6. In reading this conclusion we rely in part on our review of the affidavit by which the government originally secured the search warrant.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 86-5150

IN RE: SEARCH WARRANT (SEALED)

SUR PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING IN BANC

Present: GIBBONS, *Chief Judge*, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, *Circuit Judges*, and FULLAM, *District Judge**

The petition for rehearing filed by appellant in the above-entitled case, having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for rehearing is DENIED.

BY THE COURT:

Circuit Judge

DATED: FEB. 27, 1987

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* Honorable John P. Fullam, Chief United States District Judge for the Eastern District of Pennsylvania, as to panel rehearing only.